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HELENA, MONT., DEC. 31, 1889.

## THE LAW AND THE FACTS.

While is a conceded fact that the community is dissatisfied with the attempt to ignore the votes at precinct No. 34, and override the judgment of the court between the claimants of that vote, by the five members of the two rival bodies of the house of representatives, it is equally clear that the senate of the United States will inquire into the true result of the election according to the laws of our state, when there are two claimants for the same position, and award it to the one who has the support of representatives receiving the highest number of legal votes.

It is also equally plain that the convention had no authority to set aside the laws of the territory while in a territorial state, which had been enacted under the power conferred by congress, and ex vi termini continued in force so long as that territorial condition remained. The courts might strain a point to uphold such a law in those cases where no provisions were made and no law in existence, applicable to the election of state officers created by the constitution itself. Indeed, it might be said that such power being necessary to carry out the express powers granted, it existed by implication. But no legal or logical mind would contend for a moment that if ample provisions were contained in the law, expressly continued in force regulating the election of members of the legislative assembly, that such necessity existed. The rule in question is one founded in necessity in order to carry out the powers originally granted and it is a maxim, that "when the reason ceases then the law also stops."

But did the convention in any manner seek to interfere with the county canvass, its results, or the certificate required to be issued by the county clerks of the respective counties?

It is a principle too well established by judicial decisions, to be questioned by a judge or lawyer that canvassing boards act in a ministerial capacity, and that their duties and powers are derived solely from and limited by the law of their creation. They can determine and do just those things which the law itself provides; they may determine and do, and no more. When they go beyond this, as did the canvassing board of Silver Bow, their acts to that extent are absolutely void. They transcede the bounds of their agency and their acts are of no more binding force than if the acts of a stranger. Besides it is an universal doctrine, in the creation that when the mode of their exercise is provided by the law creating them, that the mode itself becomes and is a part of the power. The case is different when the power exists and a rule is provided for its exercise. Some times in such cases the rule is regarded as directory. But where a power is conferred and the law conferring it provides the conditions of its exercise, the one is as essential as the other, and the provision granting the power can be dispensed with, with as much propriety as the condition upon which it is based. In fact, the condition is a part of the power itself. And so it is when a special tribunal board or person is authorized to act upon a given state of facts, the existence of those facts is a condition precedent to the exercise of the power. These positions are elementary, unassailable, and no respectable lawyer will attempt to gainsay them. Measured by these doctrines, where do we find the power of the state canvassing board to change the result of the county canvassing board? Where do we find its power to declare the result of the election of members of the legislative assembly? Where do we find its power to issue certificates to any such members? The provision of the ordinance in reference to the constitution is that the state canvassing board "shall meet at the office of the secretary of the territory on or before the thirteenth day after the election, and canvass the votes cast and declare the result." But the section with reference to the officers mentioned, provides, "The votes for the above officers shall be returned and canvassed as is provided by law, and returns shall be made to the secretary of the territory and canvassed in the same manner and by the same board as is the vote upon the constitution."

The ordinary reader will perceive at once that in the one case the board of canvassers canvass the vote and declare the result, and in the other case they simply canvass the returns. In the one case the board is authorized to declare the result, because its canvass is made of the votes. In the other no such power is given, because the result is declared under the law as provided in the former part of the ordinance by the clerk of the county upon the votes returned to the county board of canvassers. These votes are "canvassed as is provided by law." Then there is no power conferred upon the state canvassing board to declare the result except in so far as the vote upon the constitution is concerned. There was no power conferred upon the state canvassing board to issue any certificates of election. To say nothing of the physical inability of that board to canvass the returns without any returns being made, such returns are a condition precedent to the legal power to canvass, which is all that the board was authorized to do.

By reference to the certificate or declaration of the result, by the canvassing board of the state, which it had no right to make in so far as the members in question are concerned, it will be seen that the returns from Silver Bow county were not before them, i. e., the very and only evidence upon which it was authorized to act at all. To say nothing of its usurpation of power in issuing certificates of election to the five bogus members, it had no authority to declare the result, and if it did the law

law required him to do beforehand. The very object was to have the question of qualification settled beforehand by providing the means for doing it. The propriety of such a law is too patent to require support in argument. Besides the law provides for disregarding ballots which are not official. It expressly prohibits the voter from in any way marking his ballot so as to ever thereafter identify it. If all the whole spirit and theory of the law is to settle the question of qualification of the voter before he casts his ballot for the evident purposes we have before suggested. Hence it is after the voter has been exposed to this ordeal and comes out unsentenced he becomes in the sense of the statute a legal voter, and the person receiving the highest number of such votes is by law declared elected.

And so it is the whole scope of the inquiry under this system, whether made by the United States senate or the courts, is and ever will be limited under our laws to the inquiry as to who received the greatest number of legal votes as shown by the registration and published list of unchallenged persons.

The whole and only question therefore is, were the votes counted, the votes cast, were they the registered votes and upon official ballots, and is there no mistake or fraud in the count? This once ascertained and all questions according to the laws in force, between the contending members can readily be disposed of. The officers at precinct No. 34 can readily be had. Their presence here can be secured at any time, and the party or men who refuse to make the investigation of the above facts occupy and will forever occupy an unavoidable position in the estimation of fair minded men. The bogus members of the rump house from Silver Bow, who sat by and refused to challenge the qualifications of registered voters of precinct No. 34 in the manner and within the time allowed by law, have waived any rights they had to do so. The published list was before them, they were presumed to know the law and will not be permitted to remain silent, take chances of the result being in their favor and if not satisfactory, then be heard to complain. Both democratic and republican candidates and their supporters were alike afforded the opportunity and charged with the duty of making challenges as to the qualification of the registered voters, and upon a failure to do it, they are now estopped. The man is verging upon idiocy who does not know that the person receiving the highest number of registered and published votes is at least prima facie elected and entitled to his seat. He is entitled to participate in the organization of the body to which he is elected, and upon the validity of that organization depends its legal existence.

The rights of the members of the house of representatives assembled at the court house, holding the certificates provided for by the statutes, and recognized by the chief executive of the state, are too plain and clear to admit of question.

The election in question being held while a territory and under territorial laws, properly enacted, and in so far as the questions here involved, continues in force even by the ordinance mentioned, if it has any bearing at all. Let us inquire into the status of the five Silver Bow members, under that law. Upon their qualifications to participate in the organization of the rump house depends its legality as a legislative body. No one will question the authority of the statute to define who shall be qualified to participate in such organization. After it is once organized, of course it becomes the sole judge of the election and qualifications of its own members. But until organization it is not in a situation to act upon the question.

As we have before seen, the power to legislate for the territories is vested in congress by the constitution of the United States. By an act of congress, contained in the Revised Statutes, section 1548, it is provided: "After the first election, however, the time, place and manner of holding elections by the people in any newly created territory, as well as of holding all such elections in territories now organized shall be prescribed by the laws of each territory." The ordinance for what it is worth provides "that the votes of the above officers which include the ones in question shall be returned and canvassed as is provided by law."

To carry into effect the powers conferred by the act of congress the legislative assembly of the territory provided by section 1033 how the county canvassing board should "open the returns and make abstracts of the votes," a purely mathematical and mechanical duty. After this abstract of votes is made from the returns it provides that "It shall be the duty of the clerk of said board of county commissioners immediately to make up a certificate of election to each of the persons having the highest number of votes for members of the legislative assembly, county and township officers respectively, and to deliver such certificate to the persons entitled to the same in registered letter to be addressed to such persons," making the right to such certificate of election dependent upon the highest number of votes according to the returns, and constituting such clerk an independent officer, so to speak, the proper person to issue the same. Section 1322 provides that "The certificate of election from the clerk of the proper county shall be held and considered as prima facie evidence of the right to membership of the person certified thereto to be elected for all purposes of organization of either branch of the legislative assembly." The provisions of the statute interpret themselves so plainly that the "wayfaring man, though a fool, need not err therein."

We shall pursue this subject further and show the effect of these provisions, and the judgment of the court in the mandamus proceedings upon the question of the organization of the house of representatives of the legislative assembly of the state of Montana, and on the validity of which organization it must alone depend for legality as a branch of the law making power of the state government.

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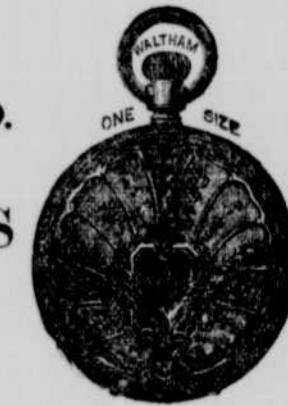


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